



BIRMINGHAM LAW SOCIETY

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**THE CIVIL JUSTICE COUNCIL'S INTERIM REPORT ON THE REVIEW OF
PRE-ACTION PROTOCOLS**

JANUARY 2022

BIRMINGHAM LAW SOCIETY DISPUTE RESOLUTION COMMITTEE RESPONSE TO THE CIVIL JUSTICE COUNCIL'S INTERIM REPORT ON THE REVIEW OF PRE-ACTION PROTOCOLS

The Birmingham Law Society ('the Society') is the largest provincial local law society with a membership of some 5,000, representing solicitors, barristers and paralegals working in the West Midlands area. This response has been prepared by the Society's Dispute Resolution Committee ('DRC') in response to the Civil Justice Council's ('CJC') Interim Report on the Review of Pre-Action Protocols ('the Interim Report'), published in November 2021.

The DRC is a committee formed of legal practitioners who deal with many different areas of law and come from various sizes of practice. Its members have experience in both claimant and defendant litigation, as well as some having invaluable judicial experience. The DRC exists to give a voice to local practitioners and lobbies on their behalf.

Whilst reform of the pre-action regime is welcomed generally by the DRC, regrettably, we do not agree with the reforms of the pre-action protocols ('PAPs') as currently proposed by the CJC. For this reason, we set out our own submissions initially under the heading "*Core Submissions*", and thereafter, answer, as best we are able, the consultation questions posed by the Interim Report (but, to be read in the light of our "*Core Submissions*") under the heading "*Responses to the Consultation Questions posed by the Interim Report*".

CORE SUBMISSIONS

We recognise that the pre-action stage is an integral part of the litigation landscape in England & Wales, allowing an opportunity in many cases, for the parties to narrow issues or even settle disputes, thereby avoiding the wasting of time, costs and judicial resources.

With that said, we are firmly of the view that the pre-action regime, as currently formulated is:

- deficient when it comes to the more common types of claim (with their being no PAPs for core claims such as breach of contract or general negligence for example);
- incomplete or 'patchy' (for example the Pre-Action Protocol for Debt Claims applies only to 'business-to-individual' disputes and not 'business-to-business' and there is a Pre-Action Protocol for Professional Negligence but not general negligence);
- overly and unnecessarily specialised in certain areas;
- too prescriptive;
- unnecessarily complex; and
- unnecessarily driving up costs.

The CJC's proposed reforms of the PAPs would only exacerbate such issues. Coupled with the ever-growing 'elephant in the room' (being an increasing number of litigants in person ('LiPs')), the answer seems, to us, to be to strip back the pre-action regime to a simpler and more straightforward regime, which is more easily accessible and understood, not only for the benefits of lawyers and their clients, but also for LiPs. This would have the additional benefit of enhancing access to justice as well as driving costs down.

We consider that our jurisdiction ought to be able to pride itself in a streamlined and straightforward pre-action regime, rather than to continue making a bigger mess by tinkering and patching up the Civil Procedure Rules'.

We advocate radical reform in the form of a single protocol which governs **all** pre-action conduct ('the Pre-Action Protocol'). Whilst such a reform may seem overwhelming and ambitious, Appendix 4 of the Interim Report provides, in our view, a solid foundation for such a simplified regime, which could be achieved with minimal amendment (as does the current Practice Direction for Pre-Action Conduct and Protocols also).

RESPONSES TO THE CONSULTATION QUESTIONS POSED BY THE INTERIM REPORT

(Questions relevant to all protocols)

1. Do you agree that the Overriding Objective should be amended to include express reference to the PAPs?

We consider that the Overriding Objective should be amended to give express reference to the Pre-Action Protocol that we have proposed.

2. Do you agree that compliance with PAPs should be mandatory except in urgent cases? Do you think there should be any other exceptions generally, or in relation to specific PAPs?

We consider that compliance with the Pre-Action Protocol that we have proposed should be mandatory except in urgent cases. We see no reason for further exceptions.

3. Do you agree there should be online pre-action portals for all cases where there is an online court process and that the systems be linked so that information exchanged through the PAP portal will be automatically accessible to the court (except for those designated as without prejudice)?

If the proposed Pre-Action Protocol were to be implemented, we would advocate a general, unified pre-action portal which has the capability to branch off and recommend steps relevant to certain types of cases (for example, referral to an Ombudsman scheme or mediation service). No doubt this would be a more realistic and cost-effective option for the public purse than an increasing amount of separate systems and processes.

4. Do you support the creation of a new summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the PAP stage? In giving your answer, please give any suggestions you might have for how such a costs procedure should operate.

Yes. We suggest that a procedure not dissimilar to summary costs assessment should be adopted.

5. Do you agree that PAPs should include a mandatory good faith obligation to try to resolve or narrow the dispute? In answering this question, please include any views you have about the proper scope of any such obligation and whether there are any cases and protocols in which it should not apply.

We consider that a mandatory good faith obligation could be included within the Pre-Action Protocol that we propose and would likely aid in the early resolution of disputes (although with the caveat that such could perhaps also present an opportunity for satellite litigation).

6. Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to try to resolve or narrow the dispute would be without prejudice? Invitations to engage in good faith steps could still be disclosed to the court to demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36. In answering this question please do include any suggestions you have as to other ways parties can be incentivised to meaningfully participate in dispute resolution processes at the pre-action stage.

Yes. We consider that the presumptive 'cloaking' of such communications with 'without prejudice' protections will likely assist in the facilitation of settlement and greater protection of parties (and in particular LiPs).

7. Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set out the issues on which they agree, the issues on which they are still in dispute and the parties' respective positions on them? Do you agree that this stocktake report should also list the documents disclosed by the parties and the documents they are still seeking disclosure of? Are there any cases and protocols where you believe the stocktake requirement should not apply? In giving your answer please also include any comments you have on the Template Joint Stocktake Report in Appendix 4.

We would welcome the introduction of the Joint Stocktake Report in combination with the Pre-Action Protocol that we propose, and do not consider that there need be any exceptions.

8. Do you agree with the suggested approach to sanctions for non-compliance set out in paragraphs 3.26-3.29? In particular please comment on:

a) Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance?

b) Whether the issue of PAP compliance should be expressly dealt with in all Directions Questionnaires, or whether parties should be required to apply to the court should they want the court to impose a sanction on an opposing party for non-compliance with a PAP?

c) Whether the PAPs should contain a clear steer that the court should deal with PAP compliance disputes at the earliest practical opportunity, subject to the court's discretion to defer the issue?

d) Whether there are other changes that should be introduced to clarify the court's powers to impose sanctions for non-compliance at an early stage of the proceeding, including

costs sanctions?

e) Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?

Whilst we take no issue with the approach to sanctions as set out at paragraphs 3.26 to 3.29 of the Interim Report, we consider that a more effective way to encourage pre-action engagement would be to introduce procedures:

- in the case of a claimant - where a claim may not proceed until pre-action requirements have been met, or alternatively, the claim may be struck out; and
- in the case of a defendant – where a form of default judgment may be obtained if pre-action requirements have not been met.

9. Do you agree that PAPs should be based on the accessibility principles and contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13?

No. We do not agree with the continuance of PAPs and consider that a simplified and general Pre-Action Protocol as proposed will do away with any concerns as regards accessibility and access to justice.

10. Do you think there are ways the structure, language and/or obligations in PAPs could be improved so that vulnerable parties can effectively engage with PAPs? If so, please provide details.

We consider that the Pre-Action Protocol that we propose, if implemented as suggested, would enable all parties, including vulnerable parties and LiPs to effectively engage with the new pre-action regime.

11. Do you believe pre-action letters of claim and replies should be supported by statements of truth?

No (although please note the exception as proposed by our answer to question 13 below).

12. Do you believe that the rule in the Professional Negligence Protocol giving the court the discretion to impose sanctions on defendants who take a materially different position in their defence to that which they took in their pre-action letter of reply should be adopted in other protocols and, if so, which ones?

We consider that the court should have the discretion in all cases to impose sanctions on defendants who adopt a materially different position in their defence to that expressed in pre-action correspondence.

13. Do you think any of the PAP steps can be used to replace or truncate the procedural steps parties must follow should litigation be necessary, for example, pleadings or disclosure? Are there any other ways that the benefits of PAP compliance can be transferred into the litigation process?

Perhaps in more straightforward cases, it may be beneficial by allowing the parties to rely on a letter of claim or letter of response as their statement of case, if subsequently endorsed by a statement of truth and filed at court.

(Questions specifically related to Practice Direction - Pre-action Conduct)

14. Do you support the introduction of a General Pre-action Protocol (Practice Direction)? In giving your answer please do provide any comments on the draft text for the revised general PAP set out in Appendix 4.

Yes, albeit that we advocate the adoption of a single, general Pre-Action Protocol that applies to all cases.

15. Do you agree parties should have 14 days to respond to a pre-action letter of claim under the general PAP, with the possibility of a further extension of 28 days where expert evidence is required? In cases of extension, the defendant would still be required to provide a reply within 14 days disclosing relevant information they had in their possession and confirming that a full reply would be provided within a further 28 days. Claimants would have 14 days to respond to any counterclaim. If you do not agree with these timeframes, what timeframes would you propose?

Yes.

16. Do you think that the general PAP should incorporate a standard for disclosure, and if so, what standard? For example, documents that would meet the test for standard disclosure under CPR 31, or meet the test for “Initial disclosure” and/or “Limited Disclosure” under Practice Direction 51U for the Disclosure Pilot. In giving your answer we are particularly interested in respondents’ views about whether the standard should include disclosure of ‘known adverse documents’.

We would welcome the incorporation of a standard for disclosure in line with “Initial Disclosure”, which no doubt would further facilitate the narrowing of issues and/or early settlement and negate the need to issue proceedings in some cases.

Questions specifically related to other protocols (questions 17 to 59)

Insofar as the other questions relate to specific protocols, we do not address these questions, because, as is clear from our “*Core Submissions*”, we advocate the introduction of a single, general, Pre-Action Protocol that applies to all claims for simplicity, ease, and in order to enhance access to justice. We hope to see an end to specific PAPs. We also consider that our membership does not have sufficient representative experience in the field of personal injury and therefore we do not comment on any of the proposals in that regard.